91-183

NO. _____

Supreme Court, U.S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

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CHARLES DAVID BOYD,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## PETITION FOR WRIT IN A CRIMINAL CASE

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## QUESTIONS PRESENTED

I. Did the United States Court of Appeals for the Sixth Circuit deny Petitioner due process and equal protection of the law by refusing to address his claim of outrageous governmental conduct under the doctrine of plain error as that doctrine is contained in Rule 52 of the Federal Rules of Criminal Procedure and Rule 103 of the Federal Rules of Evidence.

II. Was the government's conduct in this case so outrageous that it denied Petitioner due process of law?

III. Does the Sentencing Reform Act unconstitutionally permit law enforcement officers to determine a criminal defendant's sentence in violation of the doctrine of separation of powers?

## STATEMENT OF CORPORATE AFFILIATION

No corporations are involved in this matter.

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### OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit affirming Petitioner's conviction was entered on April 30, 1991. The decision was not reported and a copy of the unpublished opinion is attached. *United States* v. *Boyd*, Slip Op. No. 90-3166 (6th Cir. April 30, 1991) (copy attached; appendix p. 1a.) No application for rehearing was filed. The district court's judgment and commitment order was entered on February 22, 1990. (Copy attached; appendix p. 4a.)

## JURISDICTIONAL STATEMENT

The decision of the United States Court of Appeals for the Sixth Circuit affirming Petitioner's conviction was entered April 30, 1991. The writ of certiorari is requested pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution, which provides:

   No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or pubic danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Title 21, United States Code § 841(a), which provides in part:

   (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

   (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

   (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

2. Title 21, United States Code § 843(b), which provides:

> (b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

4. Title 21, United States Code § 848, which provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

5. Title 28, United States Code § 991, which provides:

> (a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the

Chairman. At least three of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the commission shall be members of the same political party. The Attorney General or his designee shall be an ex officio, nonvoting member of the Commission. The Chairman and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to —

(1) establish sentencing policies and practices for the Federal criminal justice system that —

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human be-

havior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

6. Rule 52 of Federal Rules of Criminal Procedure, which provides:

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain erros or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

7. Rule 103 of The Federal Rules of Evidence, which provides that:

(a) Effect of erroneous ruling. — Error may not be predicted upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. — In the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of the objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. — In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. — The court

may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury. — In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. — Nothing in this rule precludes taking notice of plain error affecting substantial rights although they were not brought to the attention of the court.

## STATEMENT OF THE CASE

On August 3, 1989, a federal grand jury returned an indictment against Charles David Boyd. The eight-count indictment charged Petitioner with unlawful use of a communication facility to facilitate the commission of a felony in violation of 21 U.S.C. § 843(b)(count one) and with the substantive charge of distributing one-half (1/2) ounce of cocaine in violation of 21 U.S.C. § 841(a)(1)(count two). In addition, Petitioner was charged with unlawful use of a communication facility (count three) with the underlying felony being the distribution of one (1) ounce of cocaine (count four), and again three more charges of unlawful use of a communication facility (counts five, six and seven) with the underlying charge an attempt to possess with intent to distribute three (3) kilograms of cocaine in violation of 21 U.S.C. § 841(b) and 21 U.S.C. § 846 (count eight).

The case was assigned to the Honorable Carl B. Rubin, Judge, and trial commenced before a jury on October 30, 1989. On November 1, 1989, the jury returned a verdict of guilty to all counts of the indictment. After the preparation of a presentence report, Judge Rubin sentenced Petitioner to imprisonment of four (4) years each on counts one, three, five, six and seven, to be served concurrently and, on count two, four and eight, a sentence of imprisonment of ten (10) years on each, all sentences to be served concurrently. In addition, Petitioner was ordered to serve eight (8) years of supervised release after his imprisonment and assessed a fine of fifty dollars ($50.00) on each of the eight counts for a total of four hundred dollars ($400.00).

A timely notice of appeal was filed in the United States Court of Appeals for the Sixth Circuit. The Court of Appeals refused to address Petitioner's claim that the government's outrageous conduct deprived him of due process of law contrary to the Fifth Amendment to the United States Constitution. While Petitioner recognized that he did not raise this claim in the district court, Petitioner urged the Court of Ap-

peals to address his claim under the doctrine of plain error, in both his initial brief and, more fully, in his reply brief.

Nonetheless, the Court of Appeals refused to address the merits of Petitioner's claim, holding that the issue of the government's conduct was waived by Petitioner's failure to raise the issue in the district court. *See United States* v. *Boyd*, Slip Op. No. 90-3166 (6th Cir. April 30, 1991) (attached appendix pp. 1a-3a).

This case began when government agents and informants made two controlled purchases of cocaine from Petitioner on March 22, 1989, and March 31, 1989, respectively. Apparently unsatisfied with these efforts, the government arranged a "reverse-sting" operation whereby the government offered to sell cocaine to Petitioner. This "sale" of cocaine (which never existed) occurred on July 18, 1989, nearly four (4) months after the last of the controlled purchases.

The government informant who arranged the controlled purchases of cocaine from Petitioner was Clarence Brown. Brown had been arrested by federal officers and was working for the government pursuant to a plea agreement. Brown testified that when he was arrested, the federal officers "picked a name" out of Brown's address book, and that person was Petitioner. Brown also testified that prior to his arrest he had purchased cocaine from Petitioner, in amounts up to as much as seven (7) grams. Acting under instructions from the government, Brown placed a telephone call to Petitioner on March 22, 1989, and attempted to arrange to purchase one-half (1/2) ounce of cocaine. A half-ounce containes fourteen (14) grams, so this amount was double any previous purchase Brown had made from Petitioner.

Government agents gave Brown five hundred and fifty dollars ($550.00) to purchase the half-ounce of cocaine. Brown testified that he met with Petitioner on March 22, 1989, outside a gasoline station and purchased the half-ounce of cocaine from Petitioner. The serial numbers of the money

had been recorded by government agents. The cocaine was then turned over to Special Agent Stephen Barnett.

Approximately one week later, on March 31, 1989, Brown again arranged to purchase additional amounts of cocaine from Petitioner. This time Brown was directed by the government agents to attempt to purchase a full ounce of cocaine from Petitioner. Brown was given one thousand one hundred and fifty dollars ($1,150.00) by government agents to make this purchase. Brown testified that Petitioner telephoned him around four or five o'clock on the afternoon of March 31, 1989, and told Brown to meet Petitioner at a certain location approximately three blocks from Brown's house. Brown gave Petitioner the money and obtained an ounce of cocaine.

Special Agent Stephen Barnett of the Federal Bureau of Investigation also testified for the government. Barnett actually observed the March 22, 1989, transaction between Brown and Petitioner. On March 23, 1989, Special Agent Barnett obtained a search warrant for Petitioner's residence. The purpose of the warrant was to search for cocaine, paraphernalia used to distribute cocaine, and money from the sale of cocaine. Among other items, a portable safe was found that contained thirteen thousand and thirty dollars ($13,030.00), which included the five hundred fifty dollars ($550.00) that was used by Brown in the controlled purchase the prior day.

Barnett was also the agent who arranged for the second controlled purchase on March 31, 1989. Barnett gave Brown one thousand one hundred and fifty dollars ($1,150.00) in cash to purchase an ounce of cocaine.[1] Brown gave the ounce of cocaine to Barnett. The record does not reveal any further interest in Petitioner until June or July of 1989. At that time, another individual, Dwayne Rodrigues, who was working

[1] Actually, one thousand and one hundred dollars ($1,100.00) was to purchase the cocaine and the additional fifty dollars ($50.00) was to pay a debt that Brown owed Boyd.

with the government pursuant to his plea agreement, contacted Petitioner. Specifically, Rodrigues agreed to sell a large amount of cocaine to Petitioner in a reverse-sting operation. In fact, there would be no cocaine and there never was any intent to complete the transaction. A series of telephone calls between Rodrigues and Petitioner were recorded by Rodrigues at the government's request. Finally, a transaction was arranged where Petitioner would purchase three kilograms of cocaine from Rodrigues. A meeting was arranged in a motel room on July 18, 1990. That meeting was videotaped. Petitioner and Rodrigues left the motel room and went to Petitioner's car so that Rodrigues could see that Petitioner actually had the money to pay for the cocaine. After Petitioner returned to the motel room he was arrested.

Based on the foregoing evidence, Petitioner was convicted of all the counts contained in the indictment, and he was sentenced as appears of record.

## REASONS FOR GRANTING THE WRIT

### I. WHEN A FEDERAL COURT OF APPEALS REFUSES TO ADDRESS AN APPELLANT'S CONTENTION THAT PLAIN ERROR OCCURRED AT TRIAL, THE COURT OF APPEALS HAS DEPRIVED THE APPELLANT OF DUE PROCESS OF LAW AND IS IN VIOLATION OF FEDERAL LAW.

Both Rule 52 of the Federal Rules of Criminal Procedure and Rule 103 of the Federal Rules of Evidence permit a Court of Appeals to take notice of plain errors which affect "substantial rights." For example, the Court of Appeals for the Sixth Circuit has held that a prosecutor's comments on the defendant's failure to testify were plain error because they violated the defendant's constitutional right not to testify. *United States* v. *Robinson*, 794 F.2d 1132, 1135-36 (6th Cir. 1986), *reversed on other grounds*, 485 U.S. 25, 108 S.Ct. 864 (1988). The Court of Appeals held under these circumstances the prosecutor's error was not harmless because it "jeopardized the fairness of the trial." *See also United States* v. *Williams*, 665 F.2d 107 (6th Cir. 1981) (holding that a violation of a defendant's due process rights can rise to a level of plain error); *and United States* v. *Jones*, 647 F.2d 696 (6th Cir. 1981), *cert. denied*, 454 U.S. 898, 102 S.Ct. 399 (1981) (holding that a jury instruction that impermissibly amends an indictment is plain error). Nonetheless, the Court of Appeals refused to review the substantive issue claimed as plain error in this case.

The claim of outrageous governmental conduct that deprives a defendant of due process of law raises a claim of constitutional magnitude. *See e.g. United States* v. *Russell*, 411 U.S. 423, 93 S.Ct. 1637 (1973). "[B]efore a federal constitutional error can be harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 21-22, 87 S.Ct. 824 (1967). The standard of review in such cases was for-

mulated by this Court in *Kotteakos* v. *United States*, 328 U.S. 750, 764-65, 66 S.Ct. 1239, 1248 (1946), when it held that:

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that *the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.* The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand. (Citations omitted; footnote omitted; emphasis added.)

An error that implicates a significant due process right, which is guaranteed by the Fifth Amendment to the United States Constitution, can only affect a substantial right of a criminal defendant. In this case, the government agents usurped both the legislative and judicial functions by proceeding against Petitioner until they had what they chose to consider sufficient charges against Petitioner and to ensure a sentence that was to their liking. Therefore, the Court of Appeals should have considered the substantive issue raised by Petitioner under a plain error theory if the Court was to guarantee that a substantial constitutional right can be vindicated when it is violated by the government.

This Court must grant the writ of certiorari in order to ensure that the Court of Appeals will review claims of error of constitutional dimension under the doctrine of plain error. Unless this result is reviewed, this case will stand as precedent

for permitting waiver of substantial fundamental and express constitutional rights without making any determination of whether the violation of those rights influenced, or were indeed the cause, of a defendant's conviction.

## II. THE GOVERNMENT'S CONDUCT IN THIS CASE WAS SO OUTRAGEOUS THAT IT DENIED PETITIONER DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In this case, government agents continued to enter into conduct designed merely to enhance the penalty to which Petitioner would be subjected. The actions of the government usurped the function of the district court and the legislature by effectively selecting the sentence that Petitioner would serve should he be convicted. This outrageous conduct of the government demands reversal of the verdicts of guilty to counts five through eight.

The concept that outrageous conduct can deprive a criminal defendant of due process of law has its genesis in *United States* v. *Russell*, 411 U.S. 423, 93 S.Ct. 1637 (1973), when then-Justice Rehnquist stated that it was possible that law enforcement officers' conduct could be "so outrageous that due process principles would *absolutely bar the government from invoking judicial process to obtain a conviction*." *Id.* at 433, 93 S.Ct. 16 1643 (emphasis added; citations omitted). Whether the government's conduct violated Petitioner's right to due process of law is a question of law that must be reviewed *de novo* by an appellate court. *United States* v. *Emmert*, 829 F.2d 805, 810-11 (9th Cir. 1987) (citations omitted). "Fundamental fairness will not permit a person to be convicted of a crime in which the governmental conduct was 'outrageous'." *United States* v. *Kinkle*, 631 F.Supp. 423, 424 (E.D. Pa. 1987) (citations omitted).

In evaluating an outrageous-conduct claim, the reviewing court looks only to the government's conduct objectively, without regard to the accused's criminal predisposition. *United States* v. *Smith*, 802 F.2d 1119 (9th Cir. 1986). *See also United States* v. *Porter*, 709 F.Supp. 770 (E.D. Mich. 1989), *affirmed without opinion*, 895 F.2d 1415 (6th Cir. 1990) (holding that the predisposition of an accused is irrele-

vant in considering the government's outrageous misconduct); *accord United States* v. *Gardner*, 658 F.Supp. 1573, 1577 (W.D. Pa. 1987).

There can be no doubt, looking at the record evidence, that the government had all of the evidence regarding the first four counts of the indictment in its possession on March 31, 1989. The two controlled buys of cocaine from Petitioner, together with the evidence obtained from the search of Petitioner's residence, was not supplemented in any way during the months that elapsed prior to Petitioner's arrest. All of these acts took place in 1989, subsequent to the effective date of the Sentencing Reform Act and the Sentencing Guidelines. *See* 28 U.S.C. § 991 *et seq.* In the case *sub judice*, counts one through four are based on a controlled purchase of either one-half (1/2) ounce or one (1) ounce of cocaine.

When the Sentencing Guidelines are consulted, Petitioner's sales of approximately forty-two (42) grams of cocaine (that is counts one through four) yields an Offense Level of fourteen (14). U.S.S.G. § 2D1.1. Petitioner's prior felony conviction resulted in no additional criminal history points because it was over fifteen (15) years old. U.S.S.G. Chapter 4, Part D. Therefore, according to the Sentencing Table, Petitioner would be in Criminal History Category I. U.S.S.G. Chapter 5, Part A. This combination (an Offense Level 14 and Category I) results in a recommended sentence of fifteen (15) to twenty-one (21) months. U.S.S.G. Chapter 5, Part D.

Including the "reverse-sting" of the non-sale of three (3) kilograms changes the sentencing options dramatically. Pursuant to statute, Petitioner was subjected to an absolute minimum sentence *of one hundred twenty (120) months or ten (10) years of incarceration*. 21 U.S.C. § 841(b)(B)(ii). In other words, the law enforcement officials in this case, not satisfied with the sentence they could obtain for the amounts of cocaine they had already purchased from Petitioner, decided to involve Petitioner in something that would increase his sentence in excess of five hundred and seventy percent

(570%), as well as seizing fifty four thousand dollars ($54,000.00) from Petitioner. Such conduct is outrageous and serves no valid public policy.

It is not disputed that government infiltration is a "recognized and permissible means of investigation." *Russell*, 411 U.S. at 432, 92 S.Ct. at 1643. "This proposition remains true even though the . . . government agent . . . supplies something of value to the criminal." *United States* v. *Brown*, 635 F.2d 1207, 1212-13 (6th Cir. 1980). This proposition, however, is grounded in the need for an undercover government agent to "be taken into the confidence of the illegal entrepreneurs." *Russell*, 411 U.S. at 432, 93 S.Ct. 1643. In this case, however, the government had completely infiltrated the illegal activity of Petitioner, and the rationale for the government involvement had evaporated.

As noted, it is a question of law whether there is misconduct by law enforcement officials which is so egregious that it contravenes due process. *United States* v. *Wylie*, 625 F.2d 1371, 1378 (9th Cir. 1980), *cert. denied sub nom. Perluss* v. *United States*, 449 U.S. 1080, 101 S.Ct. 863 (1981). In appropriate cases, a federal court of appeals should reverse a conviction if the "outrageous misconduct was, in effect, the generation by police of new crimes *merely for the sake of pressing criminal charges against the defendant.*" *See e.g. United States* v. *Ramirez*, 710 F.2d 535, 540 (9th Cir. 1983) (emphasis added) (recognizing that government actions taken solely to obtain a conviction can violate due process).

For example, in *United States* v. *Twigg*, 588 F.2d 373 (3rd Cir. 1978) an indictment was dismissed where the government, acting through an informer, provided the location and all the necessary chemicals for the unlawful manufacturing of metaphetamine. The Court of Appeals found that "[t]his egregious conduct on the part of the government agents generated new crimes by the defendant *merely for the sake of pressing criminal charges against him . . . .*" *Id.* at 381 (emphasis added).

In *United States* v. *Bogart*, 783 F.2d 1428 (9th Cir. 1986), *vacated in part on other grounds and as to another defendant*, *United States* v. *Wingender*, 790 F.2d 802 (9th Cir. 1986), the Court of Appeals also recognized that a conviction should be reversed when law enforcement officers have initiated actions merely for the sake of pressing new charges. The Court stated that this definition of outrageous conduct could trace its origins to Justice Brendeis, when he stated:

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled it if fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face. *Id.* at 1436, citing, *Olmstead* v. *United States*, 277 U.S. 438, 485, 48 S.Ct. 564, 575 (1928) (Brandeis, J., dissenting).

The Court of Appeals for the Sixth Circuit has even recognized that fundamentally unfair conduct violates a defendant's due process rights. *United States* v. *Johnson*, 855 F.2d 299, 305 (6th Cir. 1988); *see also United States* v. *Robinson*, 763 F.2d 778 (6th Cir. 1985). In the Sixth Circuit, four factors are taken into consideration when determining if police conduct implicates defendant's right to due process of law. Those factors are:

(1) the need for the type of government conduct in relationship to the criminal activity;

(2) the preexistence of a criminal enterprise;

(3) the level of the direction or control of the criminal enterprise by the government;

(4) the impact of the government activity to create the commission of the criminal activity. *Johnson*, at 305 (citations omitted).

The *Bogart* Court suggested a similar four-factor test for judging law enforcement conduct:

(1) Whether the crime would not have occurred but for the government's assistance in manufacturing the crime or whether the defendant were already involved in ongoing criminal activity;

(2) Whether the government's agents committed crimes or otherwise acted improperly;

(3) Whether the government's agents persisted with their inducements to overcome the defendant's reluctance to commit the crime; and

(4) Whether the government's agents sole motive was to obtain a conviction. *See People* v. *Isaacson*, 44 N.Y.2d 511, 521, 406 N.Y.S.2d 714, 719, 378 N.E.2d 78, 83 (1978).

*Bogart*, 783 F.2d at 1435, n.7 (citation in original).

The first factor clearly militates in favor of a reversal. There was no need for this type of government activity, unless the purpose of the Sentencing Guidelines is to allow law enforcement officers to determine the range of imprisonment imposed on a convicted defendant. This situation is indistinguishable from that where a police officer permits a bank robber to flee his custody so that the robber can be charged with the additional crime of escape as well as the

robbery. This case permits law enforcement officers who have solid evidence against a rapist to allow the accused to remain at large in the perverse hope that he will rape again and thereby be subjected to a longer prison term.

The second factor initially appears to support affirmance of this conviction because there was testimony of a preexisting criminal enterprise. Law enforcement, however, had already infiltrated that enterprise. This was not a case where law enforcement officers were attempting to investigate suspicious activity to determine whether criminal activity existed. Rather, this was a case where all the players had been identified. Indeed, some had already pled guilty to charges and were working with the government. This case, if permitted to stand, permits the government to continue to commit crimes with an accused until it decided that the accused had committed a sufficient number of crimes to ensure a virtual life sentence. The essential purpose of law enforcement is to catch perpetrators of crime; it is for the legislature and the courts to determine the sentence.

Similarly, the third factor militates in favor of a reversal. The government controlled fully two-thirds (2/3) of the criminal enterprise in this case. The government had Petitioner completely isolated. The government controlled his supplier and his purchaser. In reality, the government was buying and selling drugs to itself through a middleman. The government had Petitioner's supplier, and if it wished to infiltrate the organization the next logical step would have been to the supplier's organization.

Finally, the fourth factor also militates in Petitioner's favor. The impact of the government activity in this case was to be both purchaser and seller. *Without the government*, there would have been no large-scale transaction with which Petitioner could have been charged.

## III. THE SENTENCING REFORM ACT UNCONSTITUTIONALLY PERMITS LAW ENFORCEMENT OFFICERS TO DETERMINE A CRIMINAL DEFENDANT'S SENTENCE IN VIOLATION OF THE DOCTRINE OF SEPARATION OF POWERS.

In *Mistretta* v. *United States*, 488 U.S. 361, 109 S.Ct. 647 (1989), this Court held that the Sentencing Reform Act's delegation of authority to the Sentencing Commission did not violate the nondelegation doctrine rooted in the principle of separation of powers that underlies our tripartite system of government. Further, the *Mistretta* Court held that the requirement that federal judges serve on the Commission did not violate separation-of-powers principles. *Id.* at 406, 109 S.Ct. at 667.

The challenge presented in this case is distinct from that presented in *Mistretta*. The challenge here is that the Sentencing Commission's strict guidelines, together with this Court's doctrine of outrageous governmental conduct, effectively permits law enforcement agenices to perform unethical, immoral and probably unlawful acts that have no value other than to increase the sentence of a convicted defendant. Because of the nature of the guidelines, the district court's discretion is extremely limited in deviating from the guidelines.

As has already been noted, the seminal case regarding outrageous governmental conduct is *United States* v. *Russell*, 411 U.S. 423, 93 S.Ct. 1637 (1973). When *Russell* was decided, if a district court judge felt that the actions of the government in a particular case were unethical, immoral or unlawful, but yet did not rise to the level of outrageousness required by *Russell*, the district court could still account for the government's action in the wide discretion accorded the courts in sentencing. That possibility no longer exists.

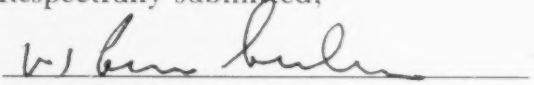
After the advent of the Sentencing Commission's Guidelines, the district court is bereft of nearly all discretion. The

relationship, therefore, between the Sentencing Guidelines and the doctrine of outrageous conduct permits law enforcement officials to effectively sentence criminal defendants in violation of the separation-of-powers doctrine. This Court should grant this petition to address this substantial fundamental constitutional question.

## CONCLUSION

For all the foregoing reasons, and to insure that the guarantee of due process of law in the Fifth Amendment to the United States Constitution, Petitioner Charles David Boyd requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,



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# APPENDIX

Not For Publication

No. 90-3166

THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLES D. BOYD,
Defendant-Appellant.

**On Appeal from the United States District Court for the Southern District of Ohio**

(Filed April 30, 1991)

Before: GUY and RYAN, Circuit Judges; and JOINER, Senior District Judge.*

RYAN, Circuit Judge. Defendant, Charles D. Boyd, appeals his jury conviction for distribution of cocaine in violation of 21 U.S.C. § 841(a)(1) and related felonies, claiming that the government's conduct in its investigation of him was outrageous. The issue on appeal is whether Boyd waived his claim of outrageous government conduct on appeal by failing

* The Honorable Charles W. Joiner, Senior District Judge of the United States District Court for the Eastern District of Michigan, sitting by designation.

to raise this issue in the district court. We hold that he did, and we shall affirm the conviction.

I.

Boyd was indicted for distribution of cocaine, unlawful use of a telephone to facilitate the commission of a felony, and attempted possession with the intent to distribute cocaine. The indictment arose from three controlled transactions. In March 1989, Boyd sold one-half ounce of cocaine to a government agent for $550 at a Sohio gas station in Cincinnati. Nine days later, Boyd sold the same agent one ounce of cocaine for $1,100. In June and July 1989, another government agent had several phone conversations with Boyd. During one of the conversations, the agent, who was living in California, agreed to deliver three kilograms of cocaine to Boyd for $54,500. On July 18, Boyd met with the agent at a hotel near Cincinnati. He showed the agent the money for the purchase, and was promptly arrested. The government recovered $50,020 in cash from Boyd's car and $4,940 on his person.

Boyd was indicted and later convicted for the above transactions in November 1989. He was sentenced to ten years imprisonment and eight years supervised release. Boyd appeals claiming that the government's conduct in its investigation of him was outrageous.

II.

The government argues that Boyd waived his claim of outrageous government conduct on appeal because he failed to raise the claim in the district court. We addressed this subject in *United States* v. *Davis*, 809 F.2d 1194, 1209 (6th Cir.), *cert. denied*, 483 U.S. 1007 (1987). In *Davis*, the defendant alleged outrageous conduct by the government, but he failed to bring a motion to dismiss on this ground prior to or during trial. We specifically held that "[t]he appellate issue is thus waived." *Id.* at 1209 (citing Fed. R. Crim. P. 12 and *United States* v. *Worthington*, 698 F.2d 820, 824 (6th Cir. 1983)).

Boyd's failure to raise the claim of outrageous conduct by the government in the district court before or during trial is a waiver of the claim.

AFFIRMED.

[DULY CERTIFIED]

ISSUED AS MANDATE: May 22, 1991
COSTS: None

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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CR-1-89-094

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UNITED STATES OF AMERICA,

Plaintiff,

v.

CHARLES D. BOYD,

Defendant.

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**JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT**

(Filed February 19, 1991)

The defendant, with counsel, H. Louis Sirkin, Esq., was found GUILTY on Count(s) 1 thru 8 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), which involves the following offense(s):

Title 21 USC 843(b) Use of a telepone to facilitate the distribution of cocaine. Cts. 1, 3, 5, 6, 7

Title 21 USC 841(a)(1), Title 21 USC 846 Attempting to Possess with intent to distribute cocaine. Ct. 8

Title 21 USC 841(a)(1) Distribution of cocaine. Cts. 2, 4

The defendant is sentenced as provided in this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of TEN (10) YEARS on Count 8.

FOUR (4) YEARS on each of counts 1, 3, 5, 6 and 7, such sentence to be served concurrently with Count 8 and each other.

TEN (10) YEARS on each of counts 2 and 4, such sentence to be served concurrently with Count 8 and each other.

Upon release from imprisonment, the defendant shall be on supervised release for a term of EIGHT (8) YEARS.

While on supervised release, the defendant shall not commit another Federal, state or local crime, and shall comply with the standard conditions of probation of the Southern District of Ohio (set forth below). If this judgment imposes restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release.

It is further ordered that the defendant shall pay to the United States a special assessment of $400.00., which shall be due immediately.

The defendant is not a candidate for voluntary surrender.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change in residence or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

/s/ CARL B. RUBIN
Chief Judge
United States District Court

_____
Date

[DULY CERTIFIED]

## STANDARD CONDITIONS OF SUPERVISION

While defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him/her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Criminal No. 1-89-94

UNITED STATES OF AMERICA,
Plaintiff,

v.

CHARLES D. BOYD,
Defendant.

**ORDER**

(Filed February 22, 1990)

This matter is before this Court for imposition of sentence upon Charles Boyd pursuant to a finding by a jury of guilty to the offenses of Use of a Telephone to Facilitate the distribution of Cocaine (18 U.S.C. § 843(b)); Attempting to possess with intent to distribute cocaine (18 U.S.C. § 841(a)(1) and 18 U.S.C. § 846); and Distribution of Cocaine (18 U.S.C. § 841(a)(1)).

All of these counts will be grouped together to form a single count group pursuant to Guideline Section 3D1.2.

The Court finds that the defendant has a criminal history category of I.

## I. Findings of Fact

In accordance with 18 U.S.C. § 3553 the Court makes the following findings of relevant facts significant to the imposition of sentence herein.

### A. Undisputed Facts

In the absence of any objection thereto, paragraph(s) one

through twelve (1-12), fourteen through seventeen (14-17), nineteen (19), and twenty-one through fifty-eight (21-58) of the Presentence Report are accepted as true.

**B. Disputed Facts**

Based upon a preponderance of the evidence, the Court determines the following disputed facts:

1. Paragraph 20, Offense Level Computations. The Court finds that the dispute among the parties is the effect of testimony by one Dwayne Rodrigues. The United States appropriately quoted the testimony of Rodrigues which is at the very least vague and devoid of any specific times. The Probation Officer determined, that the defendant Boyd should be charged with an additional six kilos of cocaine which appears to be a compromise between three kilos, which the evidence indicated defendant attempted to purchase and inferences from Rodrigues testimony which could reach 18 kilos.

This Court is unwilling to punish this defendant based upon testimony such as the following:

> Question: "Did you made deliveries of cocaine to Mr. Boyd?
>
> Answer: Yes, Sir.
>
> Question: *Approximately* how many?
>
> Answer: *Usually* like two, two k's of cocaine.
>
> Question: Alright, how many times did you do this?
>
> Answer: *Maybe* six, maybe *eight*, nine times".

(Rodiguez testimony at 5 (emphasis added)). There is a reluctance to add actual prison time to evidence based upon words such as "approximately", "maybe" and "usually". Accordingly the Court determines, that while the guideline range for three kilos would be between 78 and 97 months, 120 months appears to be more appropriate. This is approximately midway between the maximum of 97 months under Level 28 and the minimum of 151 months under Level 34.

Ten years in prison is to this Court severe punishment and in keeping with the nature of defendant's offense.

### C. Controverted But Not Significant Facts

The following matters are in controversy because of assertions of the Defendant:

1. Paragraph 13, Adjustment for Obstruction of Justice.
2. Paragraph 18, Adjustment for Acceptance of Responsibility.

No findings in regard to such matter have been made since such matters were not a basis for determining the sentence.

In accordance with the foregoing and pursuant to the appropriate guideline, the Court imposes the following sentence:

A. Imprisonment for TEN (10) YEARS.

B. Supervised release for EIGHT (8) YEARS.

## II. Conclusions Regarding Sentence

A. In accordance with 18 U.S.C. § 3553(c) the Court has selected ten years of imprisonment below the guidelines because ten years in prison is to this Court severe punishment and in keeping with the nature of defendant's offense.

B. The Court has not ordered restitution because the defendant does not have the financial wherewithal to pay a fine, and it is, therefore, waived pursuant to Section 5E1.2.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
Chief Judge
United States District Court